No. 86-1648

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON, GEORGE M. DAVIES, et al.,

Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C., and BANCO NACIONAL DE MEXICO, S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certificates of deposit issued to petitioners in the ordinary course of banking business by established, well-regulated, *bona fide* Mexican banks are securities under the federal securities laws?

2. Whether the enactment of non-discriminatory currency exchange controls by the Mexican government constituted a "taking" and whether the alleged taking was in violation of international law?

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RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *Facts*

Petitioners allegedly made peso-denominated and dollar-denominated deposits with the respondent banks in Mexico prior to August 12, 1982 and were issued certificates of deposit payable in Mexico. Respondents are banks organized under the laws of Mexico. Like all other private Mexican banks, respondents were nationalized pursuant to a decree promulgated by the Government of Mexico on September 1, 1982.[1]

[1] *Statement Pursuant to Supreme Court Rule 28.1.* The Government of the United Mexican States is the majority owner of Respondents Multibanco Comermex, S.A., Bancomer, S.N.C. and Banco Nacional de Mexico, S.A., which are nationalized instrumentalities of the Mexican government.

Prior to nationalization, and continuing through the present, the respondent banks were extensively supervised and regulated by the Mexican government and its agencies. Respondents were supervised by the Banco de Mexico (the Mexican Central Bank), the National Banking and Insurance Commission, and the Ministry of Finance and Public Credit. Respondents were required to adhere to strict financial and disclosure requirements, including paid-in capital and reserve requirements, and were required to publish monthly financial statements which were submitted for approval by the National Banking and Insurance Commission. That Commission also audited the banks annually. Respondents were also required to submit their advertising to the National Banking and Insurance Commission for prior approval. In the event of a bank failure, deposits, including the time deposit accounts at issue here, constituted preferential claims against various other obligations. Indeed, as found by the Ninth Circuit Court of Appeals in *Wolf v. Banco Nacional de Mexico*, 739 F.2d 1458, 1463 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985), no Mexican bank had failed in the last fifty years.

Petitioners made their deposits in Mexico. Each petitioner admits that he dealt with a branch of a respondent bank located in Mexico, that his funds were accepted in Mexico, and that the deposits were maintained there. Petitioners' funds, having been placed in Mexico, thus became subject to Mexican law, including exchange control regulations.

Interest and principal on the deposits were credited and paid in Mexico. Respondent Bancomer's policy would allow it to issue certificates of deposit only in Mexico and only after receipt of funds in Mexico. In addition, Bancomer maintained and paid deposits only in Mexico. Respondent Multibanco Comermex had no branch in the United States to accept, maintain or pay deposits and Multibanco Comermex's policy, therefore, required that certificates of deposit be accepted, deposited and paid only in Mexico. The certificate of deposit form used by respondent Banamex even specified a choice of Mexican law and tribunals. In short, the transactions in issue were entirely Mexican.

It is undisputed that petitioners received full and complete payment of all amounts due on their peso-denominated certificates of deposit. With respect to these certificates petitioners merely claim that the pesos received were less valuable, as against the dollar, than they had hoped, due (they also claim) to the depreciation in value of the peso as a result of the decision of the Banco de Mexico to cease its intervention in the Mexican money market.

The respondent banks' obligations under dollar-denominated certificates of deposit were directly affected by governmental action on August 12, 1982, when the Mexican Government enacted currency exchange regulations preventing them from making payment in dollars to holders of such certificates. The regulations required all Mexican banks to tender payment under certificates of deposit at their maturity in pesos at a rate of exchange fixed by law. At the time of the August decree, each of the respondent banks was privately owned. The decree applied to all Mexican banks, whether privately or publicly owned, and to all deposits denominated in foreign currency, whether the deposits were owned by Mexicans or foreigners. No discriminatory action was aimed at foreigners.

On September 1, 1982 the Government of Mexico extended and clarified its exchange control regime, and specified the Banco de Mexico as the institution that would set the applicable exchange rate for the conversion of the deposits from dollars to pesos. As in the case of the August decree, the new decree applied to all banking institutions and to all deposits in Mexico. The decree was not specially directed at foreign depositors and they received no different treatment than did Mexican depositors.

In compliance with the currency exchange regulations set forth above, petitioners who held dollar-denominated certificates were paid the full amount of both principal and interest on their deposits at maturity in pesos at the specified exchange rate, which they accepted.

It is undisputed that the actions of Mexico were taken in response to a severe economic crisis that threatened to exhaust Mexico's scarce foreign currency reserves. The provisions relating to deposits were only a small part of a comprehensive plan involving import controls, international debt restructuring and exchange controls. Moreover, the exchange control system was first put into place in August 1982, at a time when each of the respondent banks was privately owned. At no time did any of the petitioners have a contractual relationship with the Government of Mexico. Moreover, the acts of Mexico in question consisted of comprehensive legislation, national in scope, aimed not at individual contractual situations but applicable with the force of law to nationals and foreigners alike.

B. *Proceedings Below*

Petitioners brought suit in the United States District Court for the Northern District of California against the respondent banks alleging that the certificates of deposit sold by the respondents were "securities" sold in violation of the Securities Act of 1933. Petitioners also alleged that respondents had engaged in a "taking" in violation of international law by repaying petitioners' certificates of deposit in accordance with the exchange control regulations enacted by the Mexican government.

Petitioners contend that the bases for jurisdiction in the district court were the Securities Act of 1933, 15 U.S.C. §77 *l* (1),(2) and v, and the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §1602 *et seq*. However, respondents believe, and argued below, that the FSIA does not provide a basis for subject matter jurisdiction and the federal securities laws cannot provide a basis for jurisdiction independent of the FSIA.

In the district court the respondent banks moved to dismiss the actions pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Respondents argued that the certificates of deposit in question were not "securities" as defined by the federal securities laws, that all of petitioners' claims were barred by the Act of State Doctrine, and that the district court lacked both

personal and subject matter jurisdiction over respondents which, as nationalized instrumentalities of the Mexican government, are entitled to sovereign immunity under the FSIA.

Because the motion was accompanied by affidavits and other supporting documents, the district court considered the motion as one for summary judgment. The district court granted summary judgment to the respondent banks, and dismissed petitioners' claims. The district court applied the decision of the Ninth Circuit Court of Appeals in *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (1984), *cert. denied*, 469 U.S. 1108 (1985), holding that the certificates of deposit were not "securities". The district court also held that the Act of State Doctrine barred the "taking" claims. It did not rule on the issue of jurisdiction under the FSIA. Petitioners' Appendix at 47-49.

The Ninth Circuit Court of Appeals, while holding that the district court did have jurisdiction consistent with the FSIA, affirmed the judgment of the district court dismissing the actions. The Court of Appeals applied its own decision in *Wolf*, *supra*, and held that the certificates of deposit in question were not securities. It further held that there had been no "taking" of petitioners' property in violation of international law. Petitioners' Appendix at 1-46.

SUMMARY OF ARGUMENT

Not only was the Ninth Circuit Court of Appeals' affirmance of the dismissal of petitioners' claims correct, but petitioners have shown no "special and important" reasons for this Court to review on writ of certioriari the decision of the Court of Appeals. Supreme Court Rule 17. There is no conflict between the decisions of the Ninth Circuit and the decisions of this Court or of other Courts of Appeal. Nor have petitioners raised any important question of federal law that needs to be decided by this Court or any other reason justifying grant of the writ.

The holding of the Court of Appeals that the certificates of deposit purchased by petitioners were not "securities" under the federal securities laws was consistent with the decisions of all

three Courts of Appeal that have decided the question, and represented a proper application of this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). Petitioners have sought to evade these facts by disingenuously failing to inform this Court of any of the prior consistent decisions of the Courts of Appeals, and by seeking to distinguish this case from *Marine Bank*. However, petitioners attempts to distinguish this case are completely without merit and in raising these purported distinctions petitioners are inappropriately asking the Supreme Court to undertake a fact finding task already undertaken below. Nor do any of the other arguments of the Petition on this point possess merit or warrant this Court's review of the matter. Petitioners attempted reliance on the International Banking Act of 1978, for example, is indicative of the baselessness of their position, as that Act has absolutely no application to the facts of this case.

Similarly, petitioners have offered no reason why this Court should review the Court of Appeals holding that there had been no "taking" in violation of international law. That holding, like the Court's holding on the securities law issue, was consistent with settled law. Furthermore, it rested on two bases — that there had been (1) no "taking" and (2) no violation of international law — either one of which is dispositive, and both of which were clearly correct. Nor does the Court of Appeal's decision on the "taking" claim present an important question requiring resolution by this Court. Far from asking the courts to enforce clear principles of international law, the Petition improperly demands domestic judicial intervention into areas in which sovereign prerogatives are well established and seeks to have the courts of this country sit in judgment on Mexico's chosen means and policies for confronting its economic crisis.[2]

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[2] There are also additional grounds, argued below by respondents but rejected in whole or in part by the Court of Appeals, which support the dismissal of petitioners' actions. First, because adjudication of petitioners' claims would require a United States court to pass directly upon the validity and extent of a sovereign act of the Government of Mexico, *i.e.*, the imposition of exchange control regulations, the Act of State Doctrine requires dismissal of

(Footnote Continued)

ARGUMENT

I

THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE MEXICAN BANK CERTIFICATES OF DEPOSIT ARE NOT SECURITIES UNDER THE FEDERAL SECURITIES LAWS

A. *The Securities Issue Is Not Worthy Of This Court's Review.*

The Court below concluded that ". . . the certificates of deposit issued by Mexican banks are not 'securities' . . . . Since the certificates were not subject to the requirements of U.S. securities law, the [petitioners] cannot prevail on their securities law claim." Petitioners' Appendix at 28. The Court's conclusion is correct, and fully consistent with prior decisions of this Court, all circuit court decisions that have addressed the same issue, and the statutory framework embodied by the federal securities laws. Accordingly, review by the Supreme Court is neither warranted nor compelled by the circumstances of this case.

Nevertheless, petitioners suggest that the Ninth Circuit's conclusion either is inconsistent with prior precedent or represented essentially a matter of first impression before the Court below. It is neither. What petitioners fail to disclose is that their position has been unanimously rejected, and the conclusion of the Court below specifically reached, in each of three prior circuit

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(Footnote Continued)
all of petitioners' claims. The Hickenlooper Amendment, 22 U.S.C. §2370(e)(2), does not bar application of the Act of State Doctrine as the Amendment applies only to "takings" of tangible property and not intangible contract rights. In addition, the district court lacked both personal and subject matter jurisdiction over respondents, who are nationalized instrumentalities of the Mexican government entitled to soverign immunity under the FSIA, as no exception to the general rule of immunity applies under the FSIA in these cases. The existence of these alternative grounds for dismissal further demonstrates the lack of need for and the futility of granting certiorari herein.

court decisions which have addressed this issue – by the Ninth Circuit in *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); by the Fifth Circuit in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); and by the Sixth Circuit in *Riedel v. Bancam, S.A.*, 792 F.2d 587 (6th Cir. 1986).[3] Not one of those circuit court decisions is cited in petitioners' twelve-page argument devoted to the securities issue. Petition at 4-15. Petitioners would have the Supreme Court ignore the unanimous, consistent body of circuit decisions that has developed from this Court's decision in *Marine Bank v. Weaver*, 455 U.S. 551 (1982). What petitioners seek is not consistency with precedent, but instead a rejection of the clear and unanimous precedent that the Mexican bank certificates of deposit at issue are not securities under the federal securities laws.

B. *The Result Below Is Identical To The Results Reached In All Prior Decisions That Have Addressed The Issue.*

In reaching its conclusion that the securities claims of petitioners must be dismissed because the certificates of deposit at issue were not securities under the federal securities laws, the Court below followed the 1984 Ninth Circuit decision in *Wolf v. Banco Nacional de Mexico, S.A. supra*. In *Wolf*, the Ninth Circuit held that certificates of deposit issued by Mexican banks are not "securities." Significantly, the *Wolf* decision, which this Court refused to hear on writ of certiorari, has been followed by every court that has subsequently considered the same issue. In *Callejo v. Bancomer, S.A., supra*, the Fifth Circuit held "that purchasers of certificates of deposit issued by Mexican banks are adequately protected by Mexican banking law and consequently do not require the protections afforded by federal securities laws." 764 F.2d at 1125 n. 33. Likewise, in *Riedel*

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[3] In a fourth decision (from the Second Circuit), *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985), the same result was reached (to wit, dismissal of the plaintiff's securities law claim), although the Court relied only upon the Act of State Doctrine in reaching that conclusion.

v. Bancam, S.A., supra, the district court conclusion that the Mexican bank certificates of deposit were not "securities" under the federal securities law went unchallenged before the Sixth Circuit, thus resulting in a dismissal of plaintiff's federal securities law claims.

Thus, the result reached below is fully consistent with the only other circuit court decisions that have addressed the same issue. The circuits are in agreement. The law is clear. Supreme Court review is unnecessary.

C. *The Decision Below Is Consistent With, And Correctly Applies, The Test Enunciated In This Court's Decision In Marine Bank v. Weaver.*

As with the *Wolf*, *Callejo* and *Riedel* cases, the decision below was based upon an application of the test enunciated by the Supreme Court in *Marine Bank v. Weaver*, *supra*. In *Weaver*, the Supreme Court held that certificates of deposit issued by United States banks are not securities, reasoning that domestic banks are so heavily regulated under the federal banking laws that their depositors are "abundantly protected" against the risk that a bank will become insolvent. 455 U.S. at 559. Applying the *Weaver* "regulatory protection" test, the Fifth, Sixth, and Ninth Circuits have unanimously held that Mexican bank certificates of deposit are not securities. These decisions represent a logical application of the *Weaver* test to foreign bank time deposit accounts. Such an application protects U.S. depositors in those accounts to the same or similar extent depositors in U.S. bank accounts are protected, is consistent with the history and purpose of the federal securities laws, requires no unseemly discrimination against or lack of respect for neighboring and friendly countries and involves no intrusion upon acts of a foreign state.

And yet, petitioners claim that distinctions exist between this case and *Weaver* requiring application of a different legal standard. Petitioners are mistaken.[4]

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[4] Not only are petitioners mistaken in their analysis, but in raising the supposed "distinctions" in the first place are inappropriately asking the Supreme

(Footnote Continued)

For example, petitioners note that certificates of deposit issued by the Mexican banks were not insured by the FDIC. Petition at 12. Such a "distinction" is one without a difference. Petitioners ignore the fact that it is the overall effect of government regulations and not their particular terms or source which removes the risks that the securities laws were designed to protect against. The existence of FDIC insurance was only one of the factors considered by the Supreme Court in *Weaver*.[5] The decision in *Weaver* nowhere suggests that, notwithstanding all the other federal regulations which govern domestic banking operations, the FDIC's insurance limits provide the only guarantee against insolvency.[6]

(Footnote Continued)
Court to undertake essentially a fact-finding task that has already been performed by courts below (resulting in conclusions contrary to petitioners' position). *See Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d at 1463 (where the Ninth Circuit found that the Mexican banking regulatory scheme is just as comprehensive as, and in many areas more protective than, the United States federal system); *Callejo v. Bancomer, S.A.*, 764 F.2d at 1125 n. 33. Such fact finding is certainly not one worthy of this Court's review and expenditure of precious time.

[5] If deposit insurance had been a prerequisite for finding repayment of the certificate of deposit to be "virtually guaranteed" in *Weaver*, then, following petitioners' analysis, a certificate of deposit for $100,000 issued by a domestic bank would not be a security because the deposit is fully insured, whereas a certificate of deposit for $2,000,000 issued by the same bank would be a security because only five percent of that deposit would be insured. *See* 12 U.S.C. §1821(a)(1). FDIC insurance currently insures a depositor up to a maximum of $100,000 on each deposit. Thus, a deposit of $100,000 or under is fully insured against the bank's insolvency, while a $2,000,000 deposit would be protected only up to five percent of that amount. This Court did not concern itself about this point in *Weaver*, even though at the time that suit was brought therein only 80 percent of the deposit at issue was subject to FDIC insurance.

[6] Mexico has the same policy, and has been just as – if not more – effective in implementing that policy. Indeed, the comprehensive regulation and oversight of Mexico's banking industry has historically provided greater protection against bank failure than FDIC insurance has provided in the United States. Although no Mexican bank has become insolvent in 50 years (*Wolf*

(Footnote Continued)

Petitioners also attempt to distinguish *Weaver* because it did not consider the risk created by foreign currency exchange controls and devaluation. Petition at 13. But petitioners ignore the fact that "federal regulations and deposit insurance that were so important to the Court in *Weaver* would not in any way have protected [a] . . . depositor from losses caused by the devaluation." *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d at 1462. Internal and external economic risks – such as inflation, currency fluctuations or governmental intervention – have never been considered by this Court as appropriate criteria for determining whether an instrument is a "security". Such risks are inherent in all transactions. Thus, the Court in *Weaver* did not inquire whether each dollar to be received by the Weavers in 1984 would be less valuable – due to inflation, devaluation, or otherwise – than each dollar they deposited in 1978.[7] Such risks were wholly outside the control of Marine Bank and their consideration would have done nothing to advance the Court's contextual, definitional analysis.

In sum, the effort of petitioners to distinguish *Weaver* from the present consolidated cases only highlights the compelling reasons for application of the *Weaver* "regulatory protection" test to foreign bank time deposit accounts. Both the specific holding and contextual analysis of *Weaver* support the Ninth Circuit's conclusion below (and the similar conclusions reached in *Wolf*, *Callejo* and *Riedel*).

(Footnote Continued)

v. Banco Nacional de Mexico, S.A., 739 F.2d at 1463), by contrast, 722 United States banks failed in the period from 1934 to 1981, 136 of which were not insured by the FDIC. *See* 1981 Annual Report, Federal Deposit Insurance Corporation, Vol. I, p. 70. Petitioners themselves admitted below (Appellants' Brief at 14) that the regulation of banks in the United States has not always been perfect, as is evidenced by 76 recent bank failures. Nevertheless, even petitioners must agree that certificates of deposit issued by those banks cannot be securities under *Weaver*.

[7] While the effect of devaluation on this Court's analysis in *Weaver* must rest on hypothetical examples, the effect of inflation can be calculated exactly.

(Footnote Continued)

D. *Petitioners Ask The Court To Disregard Or Overrule Its Prior Decisions (Including Its Decision In Marine Bank v. Weaver) And The Consistent, Unanimous Line Of Circuit Court Authority Applying Those Decisions To The Facts Of This Case.*

Having ignored three prior circuit court decisions that have addressed the same issue and resolved it against them, and having misread this Court's decision in *Marine Bank v. Weaver*, petitioners present additional random arguments that either have been expressly rejected by this Court and other courts or are contrary to the teachings of this Court's prior decisions. Each such argument is without merit.

(1) Petitioners urge this Court to forego a contextual analysis of the case and look instead to the "plain language and obvious purposes of the Securities Act of 1933." Petition at 4. Petitioners' argument is flawed in at least two respects.

First, this Court has long ago laid to rest a literal approach to interpretation of the federal securities laws. For example, in *Weaver*, the Court reaffirmed that the test for determining whether an instrument is a security " 'is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.' " 455 U.S. at 556 (quoting from *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 211 (1967)). Moreover, even in applying the literal approach, this Court made it clear in *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985), while referring to *Weaver*, that a certificate of

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(Footnote Continued)

The six-year certificate of deposit in *Weaver* was issued in 1978 and paid interest at the rate of 7 1/2% per annum. Inflation averaged 10.9% per annum from 1978 through 1981 (Economic Report of the President, February, 1983, at 225), so that the value of the Weavers' deposit actually diminished during that period, even after interest is taken into account. This Court never suggested in *Weaver* that the absence of federal regulations protecting against the impact of inflation was material to the securities status of the certificate of deposit in issue.

deposit "did not fit squarely within one of the enumerated specific kinds of securities listed in the [statutory] definition." *Id.* at 689 n. 4.

Second, this Court has made it abundantly clear on numerous occasions that "generalized references to the 'remedial purposes'" of the securities laws "will not justify reading a provision 'more broadly than its language and statutory scheme reasonably permit.'" *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). *See also Aaron v. S.E.C.*, 446 U.S. 680, 695 (1980); *S.E.C. v. Sloan*, 436 U.S. 103, 116 (1978). Thus, petitioners' sweeping references to the "obvious purposes" of the federal securities laws will not overcome the existence of unanimous authority contrary to their position.

(2) Petitioners argue that the subject certificates of deposit should be evaluated by a test for defining a security other than the test applied in *Weaver*, *Wolf*, *Callejo*, and *Riedel*. This identical argument was properly rejected in *Wolf*: "[W]hen the Supreme Court, in *Marine Bank v. Weaver*, has so recently applied the definition [of security] to facts very similar to those in the case before us, we are bound by its reasoning there, to the exclusion of criteria articulated in other contexts." 739 F.2d at 1461.

Nevertheless, petitioners assert that since defendant Mexican banks allegedly advertised in U.S. markets and described their accounts as "investments," some different, never-before-used test should be applied here. But under this Court's prior decisions, neither factor is determinative or even material to the definitional analysis.[8] Clearly, not all "investments" are

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[8] Contrary to petitioners' argument, the pre-*Weaver* Supreme Court cases did not hold that "any instrument . . . when offered to the general public as an attractive investment and not specifically exempt, is a security for purposes of the federal securities laws." Petition at 15. Rather, the "touchstone" of those decisions (including *S.E.C. v. W. J. Howey Co.*, 328 U.S. 293 (1946) and its progeny) has been "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." *United Housing Foundation,*

(Footnote Continued)

securities. An insurance policy, for example, may be advertised and sold as a good "investment," but it is still not a "security" for purposes of the federal securities laws. Numerous decisions by this Court and, in particular, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 850 (1975), hold that the label given to an instrument is not dispositive. Moreover, even assuming advertising or solicitation of the magnitude that petitioners claim, such activities were no greater than the widespread advertisements of domestic banks offering time deposit accounts at competitive rates of interest. Petitioners would convert customary banking, deposit transactions into the sale of a security simply because of allegations of advertising. However, even in the face of allegations of direct, fraudulent solicitations by bank employees in *Weaver*, 455 U.S. at 553 (*see* lower court opinion in *Weaver v. Marine Bank*, 637 F.2d 157, 160 (3rd Cir. 1980)), this Court refused to hold the certificate of deposit to be a security. It is inconceivable that the result in *Weaver* would have been different if the plaintiffs therein had alleged or proved that the bank engaged in widespread advertising – as Marine Bank undoubtedly did – to obtain deposits.

(3) Petitioners contend that blind deference should be given to the "position of the Securities and Exchange Commission that certificates of deposit and similar instruments issued by banking organizations that are not subject to domestic bank regulation are securities." Petition at 9. Again, petitioners' presentation on this "issue" is incomplete, misleading, and flawed.

First, all of the purported "support" for petitioners' position is conspicuously pre-*Weaver* and, perhaps more significantly,

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(Footnote Continued)
Inc. v. Forman, 421 U.S. 837, 852 (1975). The certificates of deposit issued by the banks herein obviously do not involve an investment of money in a common enterprise with the expectation of profits resulting from the managerial efforts of others. Indeed, prior to *Weaver*, the courts in *Canadian Imperial Bank of Commerce v. Fingland*, 615 F.2d 465, 469-70 (7th Cir. 1980) and *Hendrickson v. Buchbinder*, 465 F.Supp. 1250, 1252 (S.D.Fla. 1979), relied upon *Howey* and concluded that accounts in foreign banks similar to those involved here were not securities.

inconsistent with the result that has been reached in all three circuit courts that have addressed the issue. Second, petitioners ignore the fact that the FDIC, another governmental agency whose views are entitled to deference, argued as an *amicus* party in *Wolf* against the position taken by the S.E.C. Indeed, the common position advocated by the Mexican bank (Banco Nacional de Mexico, S.A.) and the FDIC was adopted by the Ninth Circuit in *Wolf*. Third, while deference may on occasion be shown by the Supreme Court to the S.E.C. or other governmental agencies, that deference is not dispositive, as suggested by petitioners. Indeed, in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979), the Court refused to follow the S.E.C.'s view on the securities issue and noted that on "a number of occasions in recent years this Court has found it necessary to reject the S.E.C.'s interpretation of various provisions of the Securities Acts."

(4) Finally, petitioners contend that the Mexican banks violated the spirit, if not the letter, of the International Banking Act of 1978 (12 U.S.C. §3101, *et seq.*) ("IBA"). Petition at 16-17. The IBA governs the ability of foreign banks to establish and operate branches or agencies in the United States. 12 U.S.C. §§3101, 3102. In the present consolidated cases, it is undisputed that the certificates of deposit issued by the defendant banks were not issued by branches or agencies in the United States. As a result, the IBA has no application to petitioners' claims under the federal securities laws.[9]

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[9] Moreover, in the IBA, Congress recognized that the U.S. banking system does not operate in a vacuum, unaffected by international banking, isolated from banks in other parts of the world. The legislative history reveals an intent to encourage "free and open international banking." S. Rep. No. 1073, 95th Cong., 2d Sess. 18 (1978). At a minimum, the position advanced by petitioners would, if approved by this Court, disrupt the "free and open international banking" envisioned by Congress and would result in invidious discrimination against foreign banks not in keeping with the legislative mandate in the IBA or the judicial mandate of *Weaver*.

II

NO SPECIAL AND IMPORTANT REASONS REQUIRE REVIEW OF THE NINTH CIRCUIT'S DECISION REGARDING THE "TAKING" CLAIM

There exist no "special and important reasons" for review on writ of certiorari of the Ninth Circuit's decision on the "taking" claim. Supreme Court Rule 17. No conflict exists with decisions of this Court or of other circuit courts. To the contrary, the decision below is consistent with decisions of courts in identical and similar cases, and with recognized principles of international law. Nor does the decision on the "taking" claim present an important question that requires resolution by this Court. Thus, the petition for a writ of certiorari should be denied.

A. *The Court Of Appeals Holding That No "Taking" Had Occurred Is Consistent With Settled Law And Presents No Conflict With Decisions Of This Court Or The Other Courts Of Appeal*

Petitioners who had made deposits denominated in dollars claim that, by adhering to the regulatory scheme adopted by the Mexican Government, the respondent banks engaged in a "taking" of property in violation of international law.[10] The

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[10] By basing their claims upon allegations of a taking in violation of international law, instead of breach of contract, petitioners sought to avoid the body of law established by the unanimous holdings of the other Circuit Courts that such contract claims must be dismissed under the Act of State Doctrine. *See, e.g., Riedel v. Bancam, S.A.*, 792 F.2d 587 (6th Cir. 1986); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985); *Sanger v. Bancomer*, No. 84-1223 (S.D.N.Y. Sept. 7, 1984); *Braka v. Multibanco Comermex, S.A.*, 589 F.Supp. 802 (S.D.N.Y. 1984); *Braka v. Nacional Financiera, S.A.*, No. 83-4161 (S.D.N.Y. July 9, 1984); *Frankel v. Banco Nacional de Mexico, S.A.*, No. 82-6457 (S.D.N.Y. May 31, 1983), *appeal dismissed*, No. 83-7543 (2d Cir. July 12, 1983); *Offshore Express, Inc. v. Multibanco Comermex, S.A.*, New York Law Journal, July 7, 1983, at 6, col. 1 (N.Y. Sup. Ct.). However, the courts have steadfastly refused to allow litigants to convert what are essentially breach

(Footnote Continued)

Ninth Circuit held that a "taking" had not occurred, as that term is understood in international law, Petitioners' Appendix at 40, 42, and that the Mexican Government's exchange controls did not in any way constitute a violation of international law. In so doing, the Ninth Circuit merely applied settled law, found in the decisions of this Court and the lower courts and in the commentaries of recognized international authorities, that a sovereign nation has considerable latitude under international law in fixing its monetary policy and enacting a currency control regime, without such measures resulting in a compensable "taking".

The cases and commentators agree with the Ninth Circuit that a "taking" has not occurred when a state enacts nondiscriminatory monetary legislation of general application in the exercise of its basic authority to regulate its internal economic affairs, even though as a consequence thereof losses may result to particular persons. The most succinct exposition of this principle is found in *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 55, 295 N.Y.S.2d 433, 442, 242 N.E.2d 704, 710 (1968):

> A currency regulation which alters either the value or character of the money to be paid in satisfaction of contracts is not a "confiscation" or "taking."

(Footnote Continued)
of contract claims into claims of "confiscation or other taking." *Menendez v. Saks*, 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Friedar v. Government of Israel*, 614 F.Supp. 395, 399 (S.D.N.Y. 1985); *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F.Supp. 1337, 1346-47 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984); *Occidental of Umm al Qaywayn, Inc. v. Cities Service Oil Co.*, 396 F.Supp. 461, 472 (W.D. La. 1975), *rev'd on other grounds sub nom., Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard the Tanker Dauntless Colocotronis*, 577 F.2d 1196 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979); *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 59, 242 N.E.2d 704, 713, 295 N.Y.S.2d 433, 446 (1968).

Accord Braka v. Bancomer, S.A., 589 F.Supp. 1465, 1472-73 (S.D.N.Y. 1984) (Sofaer, J.), *aff'd*, 762 F.2d 222 (2d Cir. 1985). Dr. F.A. Mann, the leading authority on international monetary law, is in agreement:

> A legislator who reduces rates of interest or renders agreements invalid or incapable of being performed, or prohibits exports, or renders performance more expensive by the imposition of taxes or tariffs does not take property. Nor does he take property if he depreciates currency, or prohibits payment in foreign currency, or abrogates gold clauses. Expectations relating to the continuing intrinsic value of a currency, or of contractual terms such as the gold clause are, like favorable business conditions and goodwill, 'transient circumstances, subject to changes', and suffer from the 'congenital infirmity' that they may be changed by the competent legislator. They are not property, their change is not deprivation.

F.A. Mann, *The Legal Aspect of Money* 474 (4th ed. 1982) (footnotes omitted). *See also* 8 M. Whiteman, *Digest of International Law* 980-92 (1967) (collecting authorities for the same principle).

In a context where, unlike international law, the rigorous requirements of the United States Constitution must be satisfied, a long line of case law has held that property was not "taken", as that term is used in the Fifth Amendment, by the enactment of legal tender and currency legislation by the United States. In the Legal Tender Cases, this Court considered whether acts of Congress which made treasury notes legal tender for the payment of all debts were constitutional to the extent that the acts applied to existing obligations. In *Knox v. Lee*, 79 U.S. 457, 549-50 (1871), this Court stated that:

> Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. . . .

> Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless . . . It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts.

With respect to the Fifth Amendment's proscriptions against uncompensated "takings" of private property, the Court in *Knox* held that the Fifth Amendment

> has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.

Id. at 551.

The same conclusion was reached in the Gold Clause Cases, which arose out of the Joint Resolution which nullified "gold clause" stipulations in money obligations. In *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240, 305 (1935), this Court rejected a Fifth Amendment challenge to the legislation, noting that

> contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government and that no obligation of a contract "can extend to the defeat" of that authority.

It is clear, therefore, under United States law that government regulations regarding the methods and means of payment under existing contracts are not considered "takings" giving rise to a right to compensation. This principle applies *a fortiori*

where the country enacting such regulations is a foreign nation, as the cases and commentators cited above have found. Surely, petitioners can derive no greater rights against a foreign government than they would have against their own government.[11]

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[11] Petitioners refer to two decisions of this Court and one decision of the Court of Appeals for the Second Circuit in an attempt to demonstrate conflict with the Ninth Circuit's decision in the instant case. None of those decisions has any bearing on the issues presented in this case. *McDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986), involved whether certain zoning regulations amounted to a "taking" under the Fifth and Fourteenth Amendments to the United States Constitution. The case had nothing to do with currency regulations, either in the United States or elsewhere. *U.S. v. General Motors*, 323 U.S. 373 (1945), involved condemnation of a lease under the War Powers Act and had nothing to do with exchange control regulations or international law. In *Allied Bank v. Banco Credito Agricola*, 757 F.2d 516 (2d Cir.), *cert. denied*, 106 S.Ct. 30 (1985), the Government of Costa Rica totally barred repayment of dollar obligations of Costa Rican banks that were due and payable in New York and to which the laws of New York were made applicable. The Second Circuit ruled that the Act of State Doctrine did not preclude a breach of contract action because the situs of the debt was in the United States. By contrast, in the instant case the situs of the debt was clearly Mexico, where the deposits were maintained. In *dictum*, the Second Circuit stated in a footnote that the Government action constituted a "taking". 757 F.2d at 521 n.3. The Costa Rican decrees, however, totally barred payment and extinguished the obligation. *Cf.* Panel Opinion No. 1 (Revised), Fourteenth Semiannual Report 124, 126 (Foreign Claims Settlement Commission) (blocking of account is not a taking; total annulment of account without any payment is a taking). The Mexican provisions at issue here did not fully extinguish the obligation, but merely altered the currency in which the obligation would be satisfied. Petitioners in this case received and accepted the full amount of pesos to which they were entitled pursuant to the exchange control decrees.

B. *The Court Of Appeals Holding That There Was No Violation Of International Law Was Consistent With General Principles Of International Law And The Decisions Of Other Courts*

The existence of an alternative ground for dismissal of the petitioners' claim of "taking" provides yet another reason that the Petition should not be granted. Even if a "taking" were involved in this case, it is clear that the taking was not "in violation of international law." Once again, that conclusion has wide support in case law and distinguished commentary.

Section 198 of the Restatement (Second) of Foreign Relations (1965) states unequivocally that a foreign nation does not violate international law when it enacts regulations "reasonably necessary in order to control the value of currency or to protect the foreign exchange resources of the state."[12]

Several courts in addition to the Ninth Circuit have found that the same Mexican exchange controls at issue here do not violate international law. *Callejo v. Bancomer, S.A.*, 764 F.2d 1110, 1117 n.21; *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1472-73 (S.D.N.Y. 1974) (Sofaer, J.), *aff'd*, 762 F.2d 222 (2d Cir. 1985) ("the legality of such foreign exchange controls is widely accepted by authorities on international law"); *Braka v. Multibanco Comermex, S.A.*, 589 F. Supp. 802, 804 n.1 (S.D.N.Y. 1984) ("Mexican government's actions giving rise to

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[12] Comment b to that Section specifies that:

> [A] requirement that foreign funds held within the territory of the state be surrendered against payment in local currency at the official rate of exchange is not wrongful under international law, even though the local currency is less valuable on the free market than the foreign funds surrendered.

See also id., Illustration 2. The general provisions of Restatement §188, cited by petitioners, clearly have no application given the specific provisions of §198. Restatement (Second) of Foreign Relations, Chapter 4, Introductory Note.

this action were regulatory in nature and not in violation of international law").[13]

Finally, not only are the regulations at issue here perfectly consistent with general principles of international law, but those same regulations have been found to be perfectly consistent with Mexico's obligation's under the Articles of Agreement of the International Monetary Fund, the multilateral treaty that governs the actions that foreign states are permitted to take in respect of the control of their monetary resources. This has been affirmed by the Director of the Legal Department of the International Monetary Fund.[14] In a letter which was filed in this case, he concluded that

> provisions of Mexico's Currency Regulations (enacted in August and continuing in effect today) which require payment of deposits in Mexican banks to be made in Mexican pesos regardless of the currency in which the deposits are denominated . . . do not violate and are not inconsistent with the Articles of Agreement of the International Monetary Fund.

Callejo v. Bancomer, S.A., 764 F.2d 1101, 1119 (5th Cir. 1985) (reproducing letter).

Petitioners' suggestion that these established principles of international law have been swept aside by 22 U.S.C. §2370(e) is unavailing. In the first place, a reference to the compensation

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[13] Those cases are consistent with prior decisions involving other countries. *See, e.g., French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 64, 295 N.Y.S.2d 433, 450, 242 N.E.2d 704, 715-16 (1968) ("the present refusal of the Cuban government to surrender American dollars in order to protect its dollar reserves, though harsh in its effect, would also seem to be within the limits of international legality").

[14] Petitioners incorrectly state that the Legal Director's letter referred only to the August 12, 1982 regulations and not to subsequent versions of those regulations. The letter was dated May 3, 1983 and refers to "Mexico's Currency Regulations (enacted in August and continuing in effect today)". *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1119-20 (5th Cir. 1985) (accepting conclusions of IMF letter).

provisions of that section is not relevant to respondents' main point that international law does not consider the enactment of nondiscriminatory exchange control regulations to violate international law, irrespective of the type of "compensation" involved. Moreover, the principal subsection cited by petitioners, 22 U.S.C. §2370(e)(1), deals only with the President's right to suspend assistance to nations which have seized ownership or control of property, and has nothing to do with the Act of State Doctrine. By contrast, 22 U.S.C. §2370(e)(2) does detail instances in which the Act of State Doctrine is not available, but does not prescribe the standards of compensation that the court must apply in resolving the international law issue. *See* Restatement (Revised) of Foreign Relations §470, Comments c and d (Tent. Draft No.6, April 12, 1985) ("the one court that has passed on the point has suggested that U.S. courts may be free to make their own interpretations of the applicable international law standard"); Restatement (Second) of Foreign Relations §185, Reporters' Note 1 (1965) ("If the statute does constitute such a definition [of international law standards], it would apparently not have been binding"); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-88 (2d Cir. 1981) ("the standard of compensation with respect to Chase's expropriation claims is to apply principles of international, not merely local, law").

C. *Petitioners Improperly Seek American Judicial Intervention In Areas In Which Foreign Sovereign Prerogatives Are Well Established*

The regulations issued by Mexico represent a recognized exercise of fundamental economic powers of sovereign nations:

> This is not an era . . . in which there is anything novel or internationally reprehensible about even the most stringent regulation of national currencies and the flow of foreign exchange. Such practices have been followed, as the exigencies of international economics have required — and despite resulting losses to individuals — by capitalist countries and communist

> countries alike, by the United States and its allies as well as by those with whom our country has had profound differences. They are practices which are not even of recent origin but which have been recognized as a normal measure of government for hundreds of years, if not, indeed, as long as currency has been used as the medium of international exchange.

French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 63, 295 N.Y.S.2d 433, 449, 242 N.E.2d 704, 715 (1968). As the Ninth Circuit recognized, petitioners, far from asking the court to enforce clear principles of international law, are demanding domestic judicial intervention in areas in which sovereign prerogatives are well established:

> Even if there had been a taking of [respondents'] property, we would be reluctant to adopt the effective result of their position here: a judicially established guarantee of the full repayment of investments abroad in certificates of deposit notwithstanding the actions of foreign governments attempting to control their own economies. The courts of this country should not operate as an international deposit insurance company, hauling foreign sovereigns before us whenever disgruntled investors so desire.

Petitioners' Appendix at 42-43.

CONCLUSION

For all of the reasons set forth above, the Petition for a writ of certiorari should be denied in its entirety.

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